

TOWN OF KITTERY, MAINE
BOARD OF APPEALS

APPROVED
March 12, 2013

Members present: Vern Gardner, Craig Wilson, Brian Boyle, Brett Costa

Members absent: None

Staff: Heather Ross, Assistant Code Enforcement Officer

The meeting was called to order at 7:25 p.m.

Pledge to the Flag

Mr. Gardner advised the applicants that the Board now consists of four members and is therefore a quorum, with unanimous approval required. He asked if any applicant wished to defer review to a later date, and there were none.

Mr. Wilson noted Title 16.1.5.2.F.3 gives the Board of Appeals the authority to hear the following variance appeal.

ITEM 1 – Sarah Dennett requesting a variance to the terms of Title 16 Section 3.2.2D2 to add a property line on property located off Dennett Road, Map 6 Lot 13 zoned Residential-Suburban in order to divide one lot into two lots.

Ken Markley, Easterly Surveying, summarized the request noting there are 136 known cemeteries in Kittery, and probably more. He noted the Dennett cemetery parcel was separated from the homestead lot by action not taken by the owner. Applicant wishes to expand and retain ownership of the family cemetery, proposing to divide the lot at the existing drainage ditch. Mr. Markley presented that the variance request meets the criteria because:

- a. There will be no building permit needed for the proposed cemetery parcel and, given the size, would not conform to required lot standards for a building.
- b. There is no return anticipated as the applicant wishes to expand and protect the family cemetery area only. The applicant is not in the commercial funeral business.
- c. The applicant is not altering the site, but continuing its current use as a family cemetery.
- d. The shape of the parcel, created when MDOT developed the new Dennett Road, was not an action of the owner. The long narrow lot was split off from the family farm and is not further developable.

Chairman Gardner asked if there was anyone present wishing to speak on this variance request.

Ken Linscott, 109 Dennett Road, asked about the minimum lot size in the zone. The CEO stated it is 40,000 sf. There was no further public comment. The CEO provided:

1. This is a conforming lot with a cemetery.
2. This lot is located in the Suburban Residential zone requiring 40,000 sf lot size.
3. The proposal is to divide the single conforming lot into two lots, one lot would be conforming, one lot non-conforming.
4. Title 16.7.2.1 states: *No building structure or land may hereafter be used or occupied, and no building or structure or part thereof may hereafter be erected, constructed, expanded, moved, or altered and no new lot may be created except in conformity with all of the regulations herein specified for the zone where it is located, unless such structure or use exists as a legally nonconforming use, or a variance is granted.*
5. Title 16.6.4.2 states:
 - A. A variance may be granted only by the Board of Appeals under the following conditions:
 1. for a reduction in dimensional requirements related to height, area and size of structure, or size of yards and open spaces;

2. *the use is not prohibited by this Code; and*
3. *only if the strict application of the terms of this Code would result in "undue hardship." The term "undue hardship" means the applicant must demonstrate all of the following:*
 - a. *The land in question cannot yield a reasonable return unless a variance is granted.*
 - b. *The need for a variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood.*
 - c. *The granting of a variance will not alter the essential character of the locality.*
 - d. *The hardship is not the result of action taken by the applicant or a prior owner.*

Mr. Wilson noted that the proposed cemetery parcel is the cause of the requested variance. Given testimony by the applicant that the plot will not be used for commercial cemetery purposes and only as a family burial ground, the reasonable return provision of 16.6.4.2.A3a is not applicable and it meets b, c and d in that section in his opinion.

Mr. Boyle asked if a condition can be placed on a Board approval that the property must remain a cemetery.

Mr. Costa explained that State law provides excavation cannot be made within 25 feet of a cemetery boundary, and that it also allows families to designate land for a family cemetery.

Mr. Wilson contended the state created the separation of the cemetery from the homestead lot and is not a self-created hardship. The usual intent of creating a lot is to build upon it, but in this case the intended use of the new lot will continue an existing use. Because of the unique shape and division of the lot by two roads, a building permit could not be taken due to setback requirements.

Mr. Gardner noted money was exchanged in the taking by the State. Mr. Wilson noted that may have been true, but the owner may have been given no choice in the matter. The applicant, Sarah Dennett, concurred with Mr. Wilson.

Mr. Costa noted as an existing cemetery it must be recorded as such, including any expansion of the same.

In consideration of Title 16.6.6.1 Conditions and Title 16.6.6.2 Factors for Consideration,

Mr. Boyle moved to grant a variance to Sarah Dennett to the terms of Title 16 Section 3.2.2.D.2 to add a property line on property located off Dennett Road, Map 6 Lot 13 zoned Residential-Suburban in order to divide one lot into two lots, with a condition to be included on the deed that this parcel shall remain a cemetery in perpetuity and shall serve no other function.

Mr. Costa seconded

Motion carried unanimously

Findings of Fact

1. This is a conforming lot with a cemetery.
2. The 1.73 acre lot is located in the Suburban Residential zone requiring a 40,000 sf lot size.
3. The entire lot was created when the Maine D.O.T. build the new Dennett Road, separating the lot from the Dennett family farm.
4. The proposal is to divide the single conforming lot into two lots, one lot would be conforming, one lot non-conforming.
5. The proposal would create a .49 acre nonconforming cemetery lot on the Old Dennett Road adjacent to a conforming 1.24 acre lot.
6. The criteria for granting a variance (Title 16.6.4.2) was read into the record.
7. Ken Linscott, 109 Dennett Road, asked about the minimum lot size in the zone. There was no further public comment.
8. The Board agreed to condition the approval, requiring the newly created cemetery lot remain as such in perpetuity and such language be included in the property deed.

Mr. Boyle moved to accept the Findings as read
Mr. Costa seconded
Motion carried unanimously

Conclusion

Having considered Title 16.6.6.1, Conditions, and Title 16.6.6.2, Factors for Consideration, the Board agreed the requirements of Title 16.6.4.2, Variance Request, had been met and so granted the variance.

Mr. Boyle moved to accept the Conclusion as read
Mr. Costa seconded
Motion carried unanimously

Any aggrieved party has 45 days to appeal. Mr. Markley, agent, agreed to include the condition of approval on the plan mylar.

ITEM 2 – Jon Civitarese requesting a Miscellaneous Variation to the terms of Table 16.9 on property located at 200 Haley Road, Map 39 Lot 2 zoned Residential-Rural, Shoreland and Resource Protection in order to demolish an existing barn and to construct a new barn.

Jon Civitarese, applicant, summarized the miscellaneous variation request. He explained a conservation easement covers the entire property, and the owners have worked in partnership with the Kittery Land Trust to improve the property. The existing barn and out-buildings are structurally unsafe and an eyesore.

Chairman Gardner asked if there was anyone present wishing to speak on this variance request.

Gail Leonard, 11 Hartley Farm Lane, stated she views the rear of the barn every morning and concurs with Mr. Civitarese's arguments that the structure is unsafe, an eyesore, and a nuisance attraction. She is in support of his request, and believes the new design is in keeping with the surrounding neighborhood.

There was no further public comment. The CEO provided:

1. This is a conforming lot in the Residential Rural zone, and contains both shoreland overlay and resource protection zones, however the proposed structure is not within the shoreland or resource protection zones.
2. Table 16.9 requires a minimum 100-foot setback from wetlands. The proposal is to demolish an existing structure currently set back 23 feet from the pond and to construct a new retaining wall and structure, set back approximately 26 feet and 39 feet respectively from the pond.
3. The proposed new structure would be located less than the required setback, but no closer than what currently exists. The proposed septic system meets required setbacks.

Mr. Costa concurred the proposal is no closer than the existing structures.

Mr. Gardner opinioned the proposed structure is overpowering and out-of-scale.

Mr. Wilson concurred with Mr. Costa that the structure meets Title 16.7.3.5.5:

A nonconforming structure may be repaired or maintained and may be expanded in conformity with the dimensional requirements, such as setback, height, etc., as contained in this Code. If the proposed expansion of a nonconforming structure cannot meet the dimensional requirements of this Code, the Board of Appeals or the Planning Board (in cases where the structure is located in a Shoreland Overlay or Resources Protection Overlay Zone) will review such expansion application and may approve proposed changes provided the changes are no more nonconforming than the existing condition and the Board of Appeals or the Planning Board (in cases where the structure is located in a Shoreland Overlay or Resources Protection Overlay Zone) makes its decision per section 16.6.6.2. He noted adherence to the code is the charge of the Board of Appeals, and land trust easements are irrelevant to these decisions.

Mr. Boyle noted aesthetics are a personal opinion, but he would defer to the Kittery Land Trust's detailed review of the proposed design. He concurred with Mr. Wilson that the Board's review is driven by the code. He felt the proposal was an improvement to the property and the neighborhood.

The CEO read Title 16.7.3.5.4.B Nonconforming Structure Relocation:

In determining whether the structure relocation meets the setback to the greatest practical extent, the Board of Appeals or Planning Board (in cases where the structure is located in a Shoreland Overlay or Resources Protection Overlay Zone.), must consider the size of the lot, the slope of the land, the potential for soil erosion, the location of other structures on the property and on adjacent properties, the location of the septic system and other on-site soils suitable for septic systems, and the type and amount of vegetation to be removed to accomplish the relocation.

Mr. Wilson stated this section appears to apply to the moving of a house or structure and believes the Board should review under Title 16.7.3.5.5.

In consideration of Title 16.6.6.1 Conditions and Title 16.6.6.2 Factors for Consideration,

Mr. Costa moved to grant to Jon Civitarese a Miscellaneous Variation to the terms of Table 16.9 on property located at 200 Haley Road, Map 39 Lot 2 zoned Residential-Rural, Shoreland and Resource Protection in order to demolish an existing barn and out buildings, and to construct a new barn.

Mr. Boyle seconded

Motion carried unanimously

Findings of Fact

1. This is a conforming lot in the Residential Rural zone, and contains both shoreland overlay and resource protection zones, however the proposed structure is not within the shoreland or resource protection zones.
2. The property is encumbered by a conservation easement dated March 27, 1989.
3. Table 16.9 requires a minimum 100-foot setback from wetlands. The proposal is to demolish an existing structure currently set back 23 feet from the pond and to construct a new retaining wall and structure, set back approximately 26 feet and 39 feet, respectively, from the pond.
4. The proposed new structure would be located less than the required setback, but no closer than what currently exists. The proposed septic system meets required setbacks.
5. The man-made pond was built in 1955. Testimony stated barn structures were built prior to that time.
6. Gail Leonard, Hartley Farm Lane, supported the proposal, as it is in keeping with the character of the neighborhood and testified the existing structures are unsafe, an attractive nuisance, and an eyesore.
7. The proposed retaining wall located 26 feet from pond will help with drainage and erosion.
8. The Board concurred the proposal meets the requirements of Title 16.7.3.5.5 and Titles 16.6.6.1 and 16.6.6.2.

Mr. Costa moved to accept the Findings as read

Mr. Boyle seconded

Motion carried unanimously

Conclusion

Mr. Costa moved to accept the Conclusion under Title 16.7.3.5.5 Nonconforming Structure Repair and Enlargement, the Board of Appeals has the authority to grant a miscellaneous variation as the proposal is no more nonconforming than existing conditions.

Mr. Boyle second

Motion carried unanimously

Any aggrieved party has 45 days to appeal.

Minutes - February 26, 2012

Mr. Costa moved to accept the minutes as presented
Mr. Boyle seconded
Motion carried unanimously

Mr. Boyle moved to adjourn
Mr. Costa seconded
Motion carried unanimously

The Kittery BOA meeting of March 12, 2013 adjourned at 8:50 p.m.
Submitted by Jan Fisk, March 13, 2013